KUMPULAN EMAS SDN BHD.

v.

PATEL HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. 3316 OF 1977]
19 OCTOBER 1988

CIVIL PROCEDURE: *Setting aside judgment - Application under O. 35 r. 2(1) RHC 1980 - Extension of time - O. 3 r. 5(1) & (2) RHC 1980 - Defendant's original solicitors absconded - Defendant had no knowledge of judgment - Exercise of Court's discretion.*

The plaintiff had obtained judgment in the absence of defendant or its former solicitors.

Defendant applied through its present solicitors that the judgment be set aside and also that time be extended for the application to be made.

When application was dismissed, D applied for adjournment of the matter into Court and further arguments were heard. D's application was under O. 35 r. 2(1) of the Rules of the High Court 1980.

An affidavit of the secretary of the defendant stated that its former solicitors assured that the matter was dealt with amicably and it assumed that it was so. However, the defendant could not get in touch with its original solicitors and it therefore retained the present solicitors.

The plaintiff submitted that the defendant had deliberately allowed the plaintiff's claim to go by default and were not deserving of the Court's exercise of its discretion in their favour and stated that there was absence of evidence to show there was a defence and there was no triable issue.

Held:

[1] There was on the pleadings not only a triable issue but evidence that the defendant's former solicitors had assured that they would attend to the case when it came up and the defendant should not be prejudiced by the disappearance of its lawyer.

[2] Order in chambers set aside and suit be tried again *inter partes.*

[Order accordingly.]

Case referred to:
Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Ltd. [1986] 2 Lloyd's LR 221

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5(1), (2), O. 35 r. 2(1)

For the plaintiff - S. Sockanathan; M/s. Chooi & Co.
For the defendant - V.M. Mohan; M/s. V.M. Mohan

JUDGMENT

Gunn Chit Tuan J:

This civil suit was fixed for hearing on 12 February 1986. On that day only plaintiff's Counsel turned up and informed the Court that he had made several attempts to contact defendant's Counsel but in vain. I therefore proceeded with the trial of the action in the absence of the defendant and its Counsel and gave judgment for the plaintiff.

On 13 October 1986, the defendant filed an application by way of summons-in-chambers for an order, *inter alia*, that the judgment obtained on 12 February 1986, be set aside and also that time be extended for the said application to be made. After hearing the submissions of Counsel in chambers on 23 September 1987, I dismissed the said application with costs. On 26 September 1987, the defendant applied for the adjournment of the matter into Court for further arguments. I therefore adjourned the matter into Court and heard further arguments on 27 May 1988.

Mr. Mohan, Counsel for the defendant, stated that the defendant's application was under O. 35 r. 2(1) of the Rules of the High Court 1980. He then referred to O. 3 rr. 5(1) and (2) of the said rules which provide that the Court may extend the period within which a person is required or authorised by those rules to do any act in any proceedings and that the Court may extend any such period although the application for extension is not made until the expiration of that period. Counsel pointed out that although the case was fixed for hearing on 12 February 1986, yet the defendant had, as far back as 15 April 1978, filed its amended defence and counter-claim. He stated that although the date of hearing was communicated to the defendant's solicitors yet the first time the defendant knew that judgment had been obtained was on 13 September 1986, when the plaintiff's solicitors served a copy of the judgment order on the defendant.

Reference should be made to an affidavit of one Gopal Krishnan s/o Annamalai, the secretary of the defendant, dated 6 October 1986 (encl. 48) filed in support of the defendant's said application to set aside the judgment obtained on 12 February 1986. In that affidavit it was stated that the defendant had appointed Messrs Subash Chandran to act for it since 20 August 1981, and the defendant was assured that the matter was dealt with amicably and it assumed that it was so. The defendant had got in touch with Mr. Subash Chandran who assured it that he would attend to the case on 12 February 1986, and that he would ask for a postponement and that the defendant need not be present in Court. Because of Counsel's assurance the representatives of the defendant were therefore not present at the Kuala Lumpur High Court on 12 February 1986. The defendant has not been able to get in touch with Mr. Subash Chandran since that date and has therefore retained and instructed Messrs V.M. Mohan to act for it.

In an affidavit affirmed by one Long Wai Pang on 2 August 1987 (encl. 50) the secretary of the plaintiff, it was stated that on 28 January 1986 and 4 February 1986, the plaintiff's solicitors had written to the defendant's solicitors regarding the trial. But on 12 February 1986, the plaintiff's solicitors received a telegram purportedly sent on 10 February 1986, from the defendant's solicitors stating that he had no further instructions and requested that his attendance be excused. On 12 February 1986, the plaintiff's solicitors wrote a letter to the defendant's solicitors to inform him of the judgment in default against the defendant. Mr. Subash Chandran apparently never informed the defendant of the said judgment.

Mr. Mohan, Counsel for the defendant, stated from the Bar that up to the present time he has not been able to find the file of this case which was kept by Mr. Subash Chandran. When Mr. Subash Chandran absconded the defendant's file with him also disappeared. Further, Counsel referred to paras. 3, 6, 7, 10, 15 and 16 of the amended defence and counterclaim and stated that this suit involved a contract for the sale by the plaintiff and purchase by the defendant of 500 long tons of crude Malaysian palm oil to be delivered to Port Kelang. According to the defendant, a dispute arose because of a shortage of the amount of palm oil delivered and the consequent under-payment as well as the non-delivery of orders. Alternatively it was pleaded that the plaintiff should have sold the balance of stock not taken delivery of immediately in the open market after the alleged breach of the contract. In short, Counsel submitted that there were triable issues and that the defendant has a good defence and counterclaim.

Mr. Sockanathan, Counsel for the plaintiff, stated that the defendant did not take any action until judgment was served on it on 13 September 1986. He referred to the plaintiff's reply and defence to the counterclaim in which there is an averment that it was untrue that the plaintiff was unable to make deliveries to Port Kelang as alleged and neither did the plaintiff ever request on its part that delivery be made at Pasir Gudang. On the contrary, delivery was made to Pasir Gudang upon defendant's instructions. Counsel then referred to *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's LR 221 and submitted that the defendant in this case, like the defendant in the case quoted, had deliberately allowed the plaintiff's claim to go by default and were not deserving of the Court's exercise of its discretion in their favour. He referred to the following *dictum* of Sir Roger Ormrod in that case:

> The real question is whether it is a '*prima facie*' defence (per Lord Atkin in *Evans v. Bartlam* at p. 480), a 'serious' defence, (per Lord Russell of Killowen, *ibid*, at p. 482) or has merits to which 'the Court should pay heed' (per Lord Wright at p. 489).

Counsel then stated that there was absence of evidence to show that there was defence. He therefore submitted that there was no triable issue.

In my judgment there was on the pleadings not only a triable issue but there was also evidence of the said Mr. Gopal Krishnan that Mr. Subash Chandran had assured the defendant that he would attend to the case on 12 February 1986. The plaintiff would not be in a position to state whether Mr. Subash Chandran did in fact contact his client, the defendant. As Mr. Subash Chandran has absconded with defendant's file it is of course impossible to obtain any evidence from Mr. Subash Chandran as to what actually transpired between him and the defendant. But in my judgment it was probable that Mr. Subash Chandran never contacted the defendant before the case on 12 February 1986, and in the circumstances the defendant should not be prejudiced by the disappearance of its lawyer. Therefore, in all the circumstances of this case, I decided on 27 May 1988, to set aside my order in chambers dated 23 September 1987 and ordered that the suit be tried again *inter partes*. I also ordered that the defendant pay all costs thrown away.

Also found at [1989] 1 CLJ 220